IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

RECEIVED
AUG 18 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 80-5010

KENNETH HARDY,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

DARYL A. ROBINSON
Assistant Attorney
General

Please serve:

DARYL A. ROBINSON
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3349

I N D E X

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
REASONS FOR NOT GRANTING THE WRIT	
I. THE EVIDENCE SUPPORTS THE JURY'S FINDING OF THE STATUTORY AGGRAVATING CIRCUMSTANCE DEFINED IN GA. CODE ANN. § 27-2534.1(b)(7), THEREFORE THE RESULTING IMPOSITION OF THE DEATH PENALTY IS NOT IMPAIRED MERELY BECAUSE THE JURY ALSO CONSIDERED THE NONSTATUTORY AGGRAVATING CIRCUMSTANCE THAT THE OFFENSE OF MURDER WAS COMMITTED WHILE THE PETITIONER WAS ENGAGED IN THE COMMISSION OF A ROBBERY	4
II. IT WAS NOT CONSTITUTIONAL ERROR FOR THE PROSECUTING ATTORNEY TO READ DICTA FROM PRIOR CASES TO THE TRIAL COURT IN THE PRESENCE OF THE JURY	7
CONCLUSION	9
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

Cases cited:	Page
Burger v. State, 245 Ga. 458, 461-62, ___S.E.2d ___ (1980)	6,7
Drake v. State, 241 Ga. 583, 587, 247 S.E.2d 57 (1978)	8
Eberhart v. State, 47 Ga. 609 (1873)	7
Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979)	6
Godfrey v. Georgia, ___U.S.___, 100 S.Ct. 1759, 64 L.Ed.2d 398, 409 (1980)	5,6,
Gregg v. Georgia, 428 U.S. 153 (1976)	4
Hance v. State, ___Ga.___, ___S.E.2d___ (1980) (Case No. 36012, decided June 24, 1980) (Slip Op. at pp. 6-7)	5
Hardy v. State, 245 Ga. 272, 264 S.E.2d 209 (1980)	2,5,6,8
Harris v. State, 237 Ga. 718, 733, 230 S.E.2d 1 (1976)	4
Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977)	7,8
Hawkins v. State, 25 Ga. 207 (1858)	7
Jackson v. Virginia, ___U.S.___, 99 S.Ct. 2781 (1979)	6
Patrick v. State, 245 Ga. 417, 425, ___S.E.2d ___ (1980)	6,7
Potts v. State, 241 Ga. 67, 85-86, 243 S.E.2d 510 (1978)	8
Presnell v. State, 241 Ga. 49, 62, 243 S.E.2d 496 (1978)	8
Ruffin v. State, 243 Ga. 95, 105, 252 S.E.2d 472 (1979)	8
Stephens v. State, 237 Ga. 259, 261-62, 227 S.E.2d 261 (1976)	6
Statutes cited:	
Ga. Code Ann. § 27-2534.1(b)(7)	1,4,5,6,
Ga. Code Ann. § 27-2537(c)(2)	5
Ga. Code Ann. § 24-3319	7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 80-5010

KENNETH HARDY,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

I.

When the evidence supports the jury's finding of the statutory aggravating circumstance defined in Ga. Code Ann. § 27-2534.1(b)(7), is the resulting imposition of the death penalty impaired merely because the jury also considered the nonstatutory aggravating circumstance that the offense of murder was committed while the Petitioner was engaged in the commission of a robbery?

II.

Was it constitutional error for the prosecuting attorney to read dicta from prior cases to the court in the presence of the jury?

STATEMENT OF THE CASE

Kenneth Hardy was convicted in the Superior Court of Banks County, Georgia, and sentenced to die for the murder of Lewis J. Ingram. His conviction and death sentence were affirmed by the Supreme Court of Georgia on direct appeal. Hardy v. State, 245 Ga. 272, 264 S.E.2d 209 (1980). From this adverse decision, Petitioner has filed his petition for a writ of certiorari in this Court.

The events which culminated in the murder of Lewis J. Ingram began when Ingram left his residence in Thomasville, North Carolina, and traveled to his boyhood home in Commerce, Georgia, in order to visit relatives and friends. While in Commerce, Ingram spent much of his time at Willie Brown's Produce Stand and as a result became acquainted with the employees of that business. During his visits to the produce stand, Ingram made several purchases but was unable immediately to pay for the items because Dub Hardy, the father of Petitioner and an employee at the stand, was unable to change the large bills presented by Ingram as payment. Ingram evidently had more than $1,000.00 in his possession upon leaving North Carolina and this money was mostly in one hundred dollar bills.

On the fourth day of his visits at the stand, Ingram met several people there, including Dub and Mary Hardy, Billy Hardy and Buster and Betty Minish. After consuming a considerable amount of alcohol, Ingram left the stand with Buster Minish to play poker at Billy Hardy's trailer. While at the trailer, Ingram, Buster Minish and Petitioner, who had arrived upon the scene, argued. Mary Hardy, who lived with her husband Dub in a home only a few yards away from Billy Hardy's trailer,

became concerned about this behavior and asked her husband to get Ingram out of the trailer. Dub Hardy responded by walking to his son's trailer where he found Ingram on a couch in a condition of extreme intoxication. He took Ingram by the arm and attempted to lead him from the trailer but Ingram missed one of the steps at the door and fell into the yard. At this point, Kenneth Hardy attacked Ingram with a wrench, severely beating him about the head. Petitioner then took a shotgun and, along with Billy Hardy and Buster Minish, took Ingram into the woods and attempted to force him to tell where his money was. When unsuccessful, Petitioner and the others brought Ingram back and forced him into the back of his own truck with Petitioner. Billy Hardy then drove the truck to a secluded area as Buster Minish followed in another vehicle. At some point, gasoline was poured on Ingram and Petitioner then shot Ingram with a shotgun and burned his body along with his truck.

When necessary, additional facts will be recounted in the remaining portion of this brief.

REASONS FOR NOT GRANTING THE WRIT

I. THE EVIDENCE SUPPORTS THE JURY'S FINDING OF THE STATUTORY AGGRAVATING CIRCUMSTANCE DEFINED IN GA. CODE ANN. § 27-2534.1(b)(7), THEREFORE THE RESULTING IMPOSITION OF THE DEATH PENALTY IS NOT IMPAIRED MERELY BECAUSE THE JURY ALSO CONSIDERED THE NONSTATUTORY AGGRAVATING CIRCUMSTANCE THAT THE OFFENSE OF MURDER WAS COMMITTED WHILE THE PETITIONER WAS ENGAGED IN THE COMMISSION OF A ROBBERY.

In the present case the trial court charged the jury in the sentencing phase that it could consider two aggravating circumstances: (1) that the offense of murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," Ga. Code Ann. § 27-2534.1(b)(7), and (2) that the offense of murder was committed while Petitioner was engaged in the commission of a robbery.

The constitutionality of Ga. Code Ann. § 27-2534.1(b)(7) was upheld in Gregg v. Georgia, 428 U.S. 153 (1976). Nevertheless the Georgia Supreme Court has been committed to a strict construction of (b)(7) in order to insure that it does not become a "catch all" for cases which do not fall within the definitions of the other statutory aggravating circumstances enumerated in Ga. Code Ann. § 27-2534.1(b) and has stated that it will restrict its "approval of the death penalty under this statutory aggravating circumstance to those cases that lie at the core." Harris v. State, 237 Ga. 718, 733, 230 S.E.2d 1 (1976). The Georgia Supreme Court has recently clarified its position concerning cases involving (b)(7) in light of

Godfrey v. Georgia, ___U.S.___, 100 S.Ct. 1759 (1980), a case in which (b)(7) was held to have been unconstitutionally applied under the specific facts of that case. In Hance v. State, ___Ga.___, ___S.E.2d___ (1980) (Case No. 36012, decided June 24, 1980)(Slip Opinion at pp. 6-7), the Court emphasized that,

> [t]his statutory aggravating circumstance consists of two major components, the second of which has three sub-parts, as follows: (I.) The offense of murder was outrageously or wantonly vile, horrible or inhuman (II.) in that it involved (A) aggravated battery to the victim, (B) torture to the victim, or (C) depravity of mind of the defendant. In determining '[w]hether . . . the evidence supports the jury's or judge's finding of [this] statutory aggravating circumstance . . .' [Code Ann. § 27-2537(c)(2)], the evidence must be sufficient to satisfy the first major component of the statutory aggravating circumstance and at least one sub-part of the second component . . ..

In the present case "[t]he perpetrator severely beat and partially disrobed the victim seeking to find where the victim kept his money. The victim was 'cut all to pieces' and gasoline was poured over him before he was shot." Hardy v. State, 245 Ga. 272, 280, 264 S.E.2d 209 (1980). There is evidence that prior to being shot and burned along with his truck, "the victim begged, 'Please don't pour that gasoline on me.'" Id. at 274. Such actions go to the very core of Ga. Code Ann. § 27-2534.1(b)(7) and can certainly be distinguished

from the conduct involved in cases in which the death penalty is not imposed. See Godfrey v. Georgia, ___U.S.___, 100 S.Ct. 1759, 64 L.Ed.2d 398, 409 (1980). This conduct "clearly evidenced a depravity of mind on the part of [Petitioner] and involved torture to the victim. In both respects, it was outrageously and wantonly vile." Hardy v. State, 245 Ga. 272, 280, 264 S.Ed.2d 209 (1980). Thus, the evidence factually substantiates and supports the finding of (b)(7) and the sentence of death by a rational trier of fact beyond a reasonable doubt. Jackson v. Virginia, ___U.S.___, 99 S.Ct. 2781 (1979).

Since robbery, as opposed to armed robbery, is not a capital felony for purposes of imposing the death penalty, the second aggravating circumstance charged in this case does not fall within the definition of any one of the statutory aggravating circumstances enumerated in Ga. Code Ann. § 27-2534.1(b). It must be emphasized, however, that regardless of a finding of nonstatutory aggravating circumstances, the finding of one statutory aggravating circumstance is sufficient to authorize the death penalty. Ga. Code Ann. § 27-2534.1(c). The Georgia Supreme Court has held repeatedly that "the failure of one circumstance does not taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon." Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979); see Burger v. State, 245 Ga. 458, 461-62, ___S.E.2d ___ (1980); Patrick v. State, 245 Ga. 417, 425, ___S.E.2d ___ (1980); Stephens v. State, 237 Ga. 259, 261-62, 227 S.E.2d 261 (1976). Specifically, the present case closely parallels those cases in which the Georgia Supreme Court has upheld the death penalty on the basis of the finding of another aggravating circumstance when "the trial court erred during the sentencing phase in charging on kidnapping, as a statutory

aggravating circumstance, when simple kidnapping is not a capital felony." Patrick v. State, 245 Ga. 417, 424, ___S.E.2d ___ (1980); see Burger v. State, 245 Ga. 458, 461-62, ___S.E.2d ___ (1980). Thus, given the finding of (b)(7) in this case, the charge on robbery as opposed to armed robbery as an aggravating circumstance does not invalidate the death penalty.

II. IT WAS NOT CONSTITUTIONAL ERROR FOR THE PROSECUTING ATTORNEY TO READ DICTA FROM PRIOR CASES TO THE TRIAL COURT IN THE PRESENCE OF THE JURY.

Petitioner alleges that the reading of language from Hawkins v. State, 25 Ga. 207 (1858)(see Appendix C to Petitioner's brief at 14a), to the trial court in the presence of the jury during the sentencing phase of his trial deprived him "of his right to the fair prejudice-free determination of his sentence required by due process and the Eighth Amendment." (Petitioner's brief at 22). Petitioner further alleges "that the prejudicial effect of the Hawkins language was compounded by the previous misuse of the Eberhart language [Eberhart v. State, 47 Ga. 609 (1873); see Appendix D to Petitioner's brief at 18a-19a.] . . . during the closing argument in the preceding guilt phase of the trial." (See Petitioner's brief at 19).

In Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977), the Supreme Court of Georgia "disapproved" reading from opinions of the appellate courts of Georgia. The language involved in Hawes, like that in the present case, was mere obiter dicta and therefore did not technically violate Ga. Code Ann. § 24-3319 [Rule 19, Rules of the Superior Courts] which provides

in pertinent part that " [c]ounsel shall not be permitted in the argument of criminal cases, to read to the jury recitals of fact or the reasoning of the court as applied thereto in decisions by the Supreme Court or Court of Appeals." See Hawes v. State, 240 Ga. 327, 223, 240 S.E.2d 833 (1977). Thus the Court's basis for disapproving the reading of the opinions at issue here must be found in the requirement that the Supreme Court of Georgia make an independent review of death penalties in order to determine "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor." Ga. Code Ann. § 27-2537(c)(1). In the present case, after making the necessary review, the Supreme Court of Georgia found "the evidence against the defendant to be so overwhelming that the reading to the court in the presence of the jury of the dicta referred to could not have injected an improper element of passion, prejudice or other arbitrary factor." Hardy v. State, 245 Ga. 272, 279, 264 S.E.2d 209 (1980). Indeed, given the facts of the present case, it is impossible to believe "that the written words of a since deceased jurist could . . . have inflamed the jury more than the facts of the case themselves." Presnell v. State, 241 Ga. 49, 62, 243 S.E.2d 496 (1978); see Potts v. State, 241 Ga. 67, 85-86, 243 S.E.2d 510 (1978). Thus, while the use of such language may be generally disapproved it was simply not constitutional error under the circumstances of this case. See Ruffin v. State, 243 Ga. 95, 105, 252 S.E.2d 472 (1979); Drake v. State, 241 Ga. 583, 587, 247 S.E.2d 57 (1978).

CONCLUSION

Since Petitioner has failed to establish a sufficient reason for review, this Court should refuse to grant the requested writ of certiorari.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

Don A. Langham

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Daryl A Robinson

DARYL A. ROBINSON
Assistant Attorney
General

Please serve:

DARYL A. ROBINSON
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3349